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NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JANICE EDMONSON DUTHU, ET AL
Applicants

VS.

LOUIS W. SULLIVAN, M.D.
Secretary of Health and Human Services
Respondent

On Writ of Certiorari to the
United States Court of Appeals for
the Fifth Circuit

Petition for Writ of Certiorari

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January 12, 1990

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QUESTION PRESENTED FOR REVIEW

Whether the refusal by two different Social Security Administration employees on three separate occasions to make written confirmation of the appellant's attempt to file an application for benefits constitutes affirmative misconduct sufficient to estop the government from denying benefits for failure to file a written application.

LISTING OF PARTIES TO THE PROCEEDING BELOW

Janice Edmonson Duthu

James R. Dugan, II

Kelly Dugan

Louis W. Sullivan, M.D., Secretary
of Health and Human Services

Otis R. Bowen, Secretary
of Health and Human Services

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JURISDICTIONAL STATEMENT

On the 16th day of October, 1989, the United States Court of Appeals for the Fifth Circuit ruled that the government was not estopped from asserting regulations limiting the commencement period of surviving children's insurance benefits on grounds that erroneous information had repeatedly been supplied by Social Security Administration personnel. This judgment is a final judgment and this Court's jurisdiction is based upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Federal Statutes

42 U.S.C. §405(g)

"§405. Evidence and procedure for establishment of benefits

* * * *

"(g) Judicial review. Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia [United States District Court for the District of Columbia]. As part of his answer th Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter,

upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony

upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

42 U.S.C. §402(d)(1)

"§402. Old-age and survivors insurance benefit payments

* * * *

"(d) Child's insurance benefits. (1) Every child (as defined in section 216(e) [42 USCS §416(e)]) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child-

"(A) has filed application for child's insurance benefits,

"(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii)

is under a disability (as defined in section 223(d) [42 USCS §423(d)]) which began before he attained the age of 22, and

"(C) was dependent upon such individual-

"(i) if such individual is living, at the time such application was filed,

"(ii) if such individual had died, at the time of such death, or

"(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with-

"(i) in the case of a child (as so defined) of such an individual who has died, the first month in which such child meets the criteria specified in subparagraphs (A), (B), and (C), or

"(ii) in the case of a child (as so defined) of an individual

> entitled to an old-age insurance benefit or to a disability insurance benefit, the first month throughout which such child is a child (as so defined) and meets the criteria specified in subparagraphs (B) and (C) (if in such month he meets the criterion specified in subparagraph (A)),

whichever is earlier, and ending with the month preceding whichever of the following first occurs-

"(D) the month in which such child dies, or marries,

"(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time elementary or secondary school student during any part of such month,

"(F) if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of-

> "(i) the first month during no part of which he is a full-time elementary or secondary school student, or
>
> "(ii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month; or

"(G) if such child was under a disability (as so defined) at the time he attained the age of 18 or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22-

> "(i) the termination month, subject to section 223(e) [42 USCS §423(e)] (and for purposes of this subparagraph, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 222(c)(4)(A) [42 USCS §422(c)(4)(A)], the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful

> activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity),
>
> "or (if later) the earlier of-
>
> "(ii) the first month during no part of which he is a full-time elementary or secondary school student, or
>
> "(iii) the month in which he attains the age of 19,
>
> "but only if he was not under a disability (as so defined) in such earlier month.

"Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits shall also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 223(d) [42 USCS §423(d)] except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity."

Federal Regulations:

20 C.F.R. §404.603(b)

"§404.603 You must file an application to receive benefits.

* * * *

"(b) Protect your entitlement to any benefits that may be payable for as many as 6 months or 12 months (depending on the type of benefit, as explained in §404.621) before the application was filed; and"

20 C.F.R. §404.614(a)

"§404.614 When an application or other form is considered filed.

"(a) General rule

"An application for benefits, or a written statement, request, or notice is filed on the day it is received by an SSA employee at one of our offices or by an SSA employee who is authorized to receive it at a place other than one of our offices."

20 C.F.R. §404.621(a)(1)(ii)

"§404.621 Filing after the first month you meet the requirements for benefits.

"(a) Filing for disability benefits and for old-age, survivors', or dependents' benefits.

* * * *

"(ii) If you file an application for old-age benefits, widow's or widower's benefits not based on disability, wife's, husband's, or child's benefits based on the earnings record of a person not entitled to disability benefits, or mother's, father's, or parent's benefits, after the first month you could have been entitled to them, you may receive benefits for up to 6 months immediately before the month in which your application is filed. Your benefits may begin with the first month in this 6-month period in which you meet all the requirements for entitlement. However, entitlement to old-age, wife's, husband's, widow's, or widower's benefits under this rule is limited by paragraph (a)(1)(iii) of this section."

20 C.F.R. §404.630

"§404.630 Use of date of written statement as filing date.

"If a written statement, such as a letter, indicating your intent to claim benefits either for yourself or for another person is filed with us under the rules stated in §404.614, we will use the filing date of the written statement as the filing date of the application, if all of the following requirements are met:

"(a) The statement indicates an intent to claim benefits.

"(b) The statement is signed by the claimant, the claimant's spouse, or a person described in §404.612. If you telephone us and advise us that you intend to file a claim but cannot file an application before the end of the month, we will prepare and sign a written statement if it is necessary to prevent the loss of benefits.

"(c) The claimant files an application with us on an application form as described in §404.611, or one is filed for the claimant by a person described in §404.612, within 6 months after the date of a notice we will send advising of the need to file an application. We will send the notice to the claimant. However, if it is clear from the information we receive that the claimant is a minor or is mentally incompetent, we will send the notice to the person who submitted the written statement.

"(d) The claimant is alive when the application is filed; or if the claimant has died after the written statement was filed, an application is filed--

"(d)(1) By or for a person who would be eligible to receive benefits on the deceased's earnings record;

"(d)(2) By a person acting for the deceased's estate; or

"(d)(3) If the statement was filed with a hospital under §404.632, by the hospital if--

"(d)(3)(i) No person described in paragraphs (d)(1) or (2) of this section can be located; or

"(d)(3)(ii) A person described in paragraphs (d)(1) or (2) of this section is located but refuses or fails to file the application unless the refusal or failure to file is because it would be harmful to the deceased person or the deceased's estate."

STATEMENT OF THE CASE

Plaintiffs, Janice Edmonson Duthu, James Dugan, II, and Kelly Dugan, seek review of a final decision rendered by the United States Court of Appeals for the Fifth Circuit, pursuant to 28 USC §1254(1). That decision denied the Dugan children child's insurance benefits from the date their mother first sought to obtain those benefits (March, 1980) and instead found only one child entitled to benefits effective May, 1985. Original federal jurisdiction was grounded upon 42 USC §405(g).

On December 16, 1985, Janice Edmonson Duthu, the ex-wife of the deceased wage earner, filed a formal written application for child's insurance benefits on behalf of her two children, James and Kelly Dugan. Pursuant to that application, the Social Security Administration made a special

determination that the children's father, James Dugan, had died in a plane crash on December 18, 1979. On March 18, 1986, the Social Security Administration (SSA) ruled that Kelly Dugan was not entitled to surviving child's insurance benefits as she did not meet the age requirements during the months for which the application applied. The Administration further determined that James Dugan, II was entitled to receive benefits effective May, 1985. The Social Security Administration upheld this determination on reconsideration and the case was referred to an Administrative Law Judge for hearing and de novo review.

The Honorable J. Charles Collins, Jr., Administrative Law Judge, found that the children were entitled to receive surviving child's insurance benefits effective March, 1980, based upon

the plaintiff's oral application for benefits at that time. On its own motion, the Appeals Council reviewed and modified the decision of the Administrative Law Judge and held that Kelly Dugan was not entitled to receive any benefits, and that James Dugan, II was entitled to receive benefits only as of May, 1985. This holding became the Secretary's final decision.

The plaintiffs then sought Federal District Court review pursuant to 42 USC §405(g), alleging that the Secretary erred in denying James and Kelly Dugan's surviving child's insurance benefits under §202(d)(1) of Title II of the Social Security Act, 42 USC §402(d)(1), between March, 1980 and May, 1985. The matter was referred to the Honorable Jacob J. Meyer, United States Magistrate, and motions for summary judgment were filed by both

parties. On September 8, 1988, after thorough review of the facts and applicable law, Magistrate Meyer found that the Secretary had erred in concluding the effective date of the benefits to be May, 1985. He therefore recommended that the plaintiffs' motion for summary judgment be granted and that defendant's motion for summary judgment be denied, thus entitling the children to benefits as of March, 1980.

The defendant, Otis R. Bowen, then Secretary of Health and Human Services, objected to the report and recommendation of Magistrate Meyer and the cause was brought on for hearing on October 12, 1988 before the Honorable Morey L. Sear. The District Court allowed the objections of the Secretary to the report of the Magistrate and denied the recommendation. Plaintiffs then perfected an appeal to the

United States Court of Appeals for the Fifth Circuit.

Judge Jolly, writing for the Court, found the facts to be as follows:

> "In December 1979 Janice Duthu learned that her children's father, her former husband, James R. Dugan, had disappeared en route to Venezuela and was presumed dead as a result of a plane crash. In January 1980 Mrs. Duthu telephoned the SSA office in Houma, Louisiana, and inquired about filing an application for surviving child's insurance benefits on behalf of her two children. An employee erroneously informed her that she could not file an application for benefits until she obtained more evidence of her ex-husband's death, and that, without evidence of death, she would have to wait seven years to file.
>
> "Mrs. Duthu did not accept this answer as the final word. In March 1980 Mrs. Duthu, with her mother along, went to the SSA office and an employee told them that it would be futile to file an application without evidence of her former husband's death. When Mrs. Duthu asked the employee to make a written record that she had attempted to file and that she intended to do so when she had evidence of Mr. Dugan's death, he told her that such a written record would not be noticed by the SSA office.

"About two or three years later, with hope rising from desperation, Mrs. Duthu returned to the SSA office yet again, and attempted once more to apply for surviving child's insurance benefits. Another SSA employee, identified by her as Mrs. Castanza, told her that she could not apply until she produced evidence of Mr. Dugan's death. Mrs. Duthu insisted that Mrs. Castanza make a written record of her visit and attempt to file, but Mrs. Castanza told her that such a record would not do any good and would waste the SSA's time.

"Finally, believing that seven years had passed since Mr. Dugan's disappearance, Mrs. Duthu returned to the SSA office in October 1985. Mrs. Castanza informed her that she could not file for one more year. Mrs. Duthu again asked Mrs. Castanza to make a written record of her attempt to file; again, Mrs. Castanza refused.

"After hearing of Mrs. Duthu's plight and frustrations, a friend suggested that she contact Mrs. Tregg, an SSA administrator. In November 1985 Mrs. Tregg told Mrs. Duthu that she could file for benefits immediately, and that she could have applied for benefits in January 1980, when Mrs. Duthu first telephoned the SSA to inquire about filing for benefits." Duthu v. Sullivan, 886 F.2d 97, 98 (5th Cir. 1989).

The Court concluded that Mrs. Duthu's efforts to protect her children's rights exceeded the efforts made by the claimants in Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981), and Jones v. Department of Health & Human Services, 843 F.2d 851 (5th Cir. 1988). Furthermore, the Court noted that the blunders of the SSA employees in Mrs. Duthu's case were more serious than the mistakes made by the government in Hansen, supra, and Jones, supra. Nonetheless, the holding of the panel was that the misconduct was not of the character necessary to overcome the rule that a government employee's misinformation and ineptitude will not estop the government from requiring an application for benefits. Thus, Applicants seek a writ of certiorari to this Honorable Supreme Court.

ARGUMENT

The appellant is abundantly aware of this Court's decision in Schweiker v. Hansen, supra, at 19, wherein it was held that an SSA field representative's errors fell far short of conduct which would estop the government from insisting upon compliance with regulations requiring written applications.

The most significant portion of the Hansen decision, as the law relates to this case, however, was expressed by the Court as follows:

> "This Court has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits." Id. at 788.

It is, and has been throughout the litigation of this cause, respectfully urged that the egregious misconduct engaged in by the Social Security

Administration employees in the instant case constitutes the type of "affirmative misconduct" necessary to estop the government from insisting upon compliance with regulations governing the distribution of welfare benefits.

The facts in this matter are not disputed. The eligibility of the young Dugans for children's insurance benefits at the time of their father's death is not disputed. The only question which arises is whether the government may, through negligent, willful, and affirmative misconduct, prevent a citizen from filing a written application for benefits and then rely on the absence of such an application to deny social security benefits. It is appellants' contention, and a liberal and broad construction of the Social Security Act should demand, that estoppel operate in such

circumstances to prohibit the agency from requiring compliance with its procedural regulations regarding written applications.

Estoppel may operate against the government.

Since the Supreme Court cautioned in Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947), that "Men must turn square corners when they deal with the government", Id. at 385, a window of equity has been opened to those who have suffered as a result of their government's malfeasance. That window of equity is estoppel.

In Montana v. Kennedy, 366 U.S. 308, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961), it was implied that the government might be estopped if it were shown that it had engaged in "misconduct". Id. at 314-315. This possibility was reinforced by INS v. Hibi, 414 U.S. 5, 8, 94 S.Ct. 19, 21-22,

38 L.Ed.2d 7 (1973), and left open in Schweiker v. Hansen, supra. Furthermore, the 9th Circuit has noted that "...estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel." U.S. v. Lazy F.C. Ranch, 481 F.2d 985, 989 (9th Cir. 1973).

However, certain conditions must be met before such a claim may be asserted. Firstly, the traditional elements of estoppel must be proven. McDonald v. Schweiker, 537 F.Supp. 47, 49 (N.D. Ind. 1981). These elements are as follows:

1. The party to be estopped must know the facts;

2. He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe that it is so intended;

3. The latter must be ignorant of the true facts; and

4. He must rely on the former's conduct to his injury.

In addition, "...to invoke estoppel against he government, the party claiming [it] must show 'affirmative misconduct' as opposed to mere failure to inform or assist." Lavin v. Marsh, 644 F.2d 1378, 1382, (9th Cir. 1981); and McDonald v. Schweiker, supra, at 49.

The existence of affirmative misconduct must be determined on a case by case basis.

As this Court "...has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations...", Schweiker v. Hansen, supra, at 788, whether an instance of misconduct amounts to "affirmative misconduct" must be decided on a case by

case basis. The Courts have analyzed factual situations and found that certain actions or inaction by government agents does not equal affirmative misconduct. Specifically, in Schweiker v. Hansen, supra, an SSA employee gave the plaintiff erroneous information regarding eligibility during a one-time, fifteen minute interview. The employee also failed to recommend to the claimant that she file an application notwithstanding his advice. This Court held that the employee's failure to advise the claimant to file did not constitute affirmative misconduct:

> "In sum, Connelly's errors 'fal[l] far short' of conduct which would raise a serious question whether petitioner is estopped from insisting upon compliance with a valid regulation [re: the necessity of a written application]." Hansen, 450 U.S. at 790, 101 S.Ct. at 1472.

The Fifth Circuit recently addressed this issue in Jones v. Department of

Health & Human Services, 843 F.2d 851 (5th Cir. 1988). Therein, the plaintiff made a telephone call to an SSA Teleservice representative in 1983, inquiring as to whether she was eligible for early retirement benefits and whether she would be entitled to divorced spouse's benefits. She was erroneously told that if she accepted retirement benefits on her own employment record, she would be barred from receiving divorced spouse's benefits, for which she would otherwise be eligible in 1985. Relying on this misinformation, she did not apply for benefits until 1984. At that time, she was told that she could have received early retirement benefits in 1983 and that it would not have disqualified her from receiving divorced spouse's benefits. Her failure to apply for those benefits in 1983 prevented her from receiving them in 1985. She claimed

that the SSA should have been estopped from denying her the benefits because she had relied to her detriment on the misinformation given by SSA employees.

Citing Hansen, the Fifth Circuit held in favor of the SSA because "...erroneous oral statements by government agents without more are insufficient to apply estoppel." Jones 843 F.2d at 853, (Emphasis added).

Likewise, the Courts have examined certain factual scenarios and found the government's actions egregious enough to allow estoppel. Holmes v. Weinberger 423 F.Supp. 149 (EDNY 1976); McDonald v. Schweiker, supra. In Holmes, the plaintiff inquired several times by telephone about filing an application for surviving child's insurance benefits on behalf of her son. She was erroneously told that she would have to wait until she

could supply the SSA with the wage earner's social security number. As a result of this misinformation, plaintiff did not file until 1973, six years after her son became eligible for benefits. The Administrative Law Judge found that her son was entitled to benefits retroactive to 1967. The Appeals Council reversed, asserting that since the filing of a written application was required in order to receive benefits, the 1973 date had to be used to determine the effective date of the benefits.

The Court, in Holmes, held that the SSA could not rely on the requirement for written application to deny benefits under the facts of that case because to do so would conflict with the liberal construction to be given the Social Security Act. "Congress intended the Social Security Act as a broad program of

social insurance on which working people could rely to provide for themselves and their dependents in old age. It is essential, therefore, that the Act be liberally construed and applied." Holmes, 423 F.Supp. at 154.

The Seventh Circuit's decision in Cheers v. Secretary of Health, Education & Welfare, 610 F.2d 463 (7th Cir. 1979), limited the holding in Holmes, but carved out an exception to apply in those cases where the Administrative Law Judge found the claimant's testimony concerning the attempt to file to be credible:

> "The most important distinguishing feature between these two cases, of course, is that in Holmes the ALJ specifically stated that he had 'listened to and observed [plaintiff's testimony] and [had] no reason to doubt that she made the inquiries alleged... In the present case on the other hand, the ALJ specifically found that there was no persuasive evidence to support the appellant's claim that he had actually inquired about his benefits prior to 1976...

> "In light of 42 USC §405(g), which states that these findings of fact and credibility determinations are binding upon us if supported by substantial evidence, which we believe they are in the present case, we find the Holmes decision is inapposite to the present controversy." Cheers, 610 F.2d at 468.

It should be noted that the Supreme Court in Hansen cited Cheers with approval. See Hansen, 450 U.S. at 789, 101 S.Ct. at 1471.

The post Hansen decision that follows Holmes and employs the exception laid out in Cheers is McDonald, supra. In McDonald, the claimant inquired in 1975 about her eligibility for retirement insurance benefits when she reached age 62. In a written response from the SSA, she was informed that according to SSA calculations, she would need to acquire more calendar quarters of work before she could become eligible at age 62. When she

took her husband to the Social Security office in 1979 to apply for disability benefits, she was informed that the SSA's original calculations had been inaccurate and that she could have applied for retirement benefits in November, 1978, when she reached age 62.

The ALJ held that the SSA was estopped from denying her the benefits to which she had been entitled in November, 1978. The Appeals Council reversed, holding that she was only entitled to benefits as of August, 1979, the month of her application. The District Court reversed the Appeals Council, noting that the Supreme Court in Hansen had left open the possibility that the government could be estopped with the issue of what constitutes affirmative misconduct to be decided on a case by case basis. McDonald, 537 F.Supp. at 50.

Applying the exceptions laid out in Cheers, supra, the District Court held that the SSA could be estopped because the ALJ had found the claimant's testimony concerning the misrepresentation of her eligibility to be credible. The Court also relied on on a Ninth Circuit decision in which it held that "before invoking the doctrine of estoppel we ask whether the citizen dealing with the government has acted diligently to protect his own interest. Lavin apparently did not attempt to confirm the recruiter's representations by either reading the mandatory retirement provisions, or by requesting a written statement setting forth his eligibility." Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981) (Emphasis added).

In sum, the Court in McDonald believed that the claimant had no way of

knowing whether the SSA's calculations of calendar quarters of work were correct. Additionally, she could not have taken any action to avoid the consequences of the SSA's mistake because filing the application on the basis of their calculations would have resulted in a denial. The Court felt that those two factors, combined with the credibility determination made by the ALJ compelled the holding of estoppel against the SSA.

The facts of the instant case require that the government be estopped from denying benefits to the Dugan children.

The plaintiff's circumstances satisfy the traditional test for estoppel and involve governmental action of such an egregious nature that it constitutes affirmative misconduct.

Mrs. Duthu asked three times to have a written record made of her visits to the

Social Security office. Certainly, this meets the requirements of the Ninth Circuit in Lavin, supra, that estoppel should not be invoked against the government unless the citizen attempted to protect her interests by getting a written record from the government employee setting forth her eligibility. And unlike Hansen, supra, the Social Security employees herein did not merely fail to inform Mrs. Duthu of the advantages of filing an application. Instead, on three separate occasions, they repeatedly refused to allow her to file one.

The agency's employees without question provided oral misinformation, but in contrast to Jones, supra, they went beyond that level of negligence and prevented the plaintiff from filing an application in direct contravention of 20

CFR §404.603(b) and also refused to provide a written record of her visits.

Had they complied with her request, 20 CFR §404.614(a) would have applied. That section states that an application or a written statement, request, or notice is filed the date it is received by an SSA employee. The date that notice of intent to file an application is received by an SSA office can be treated as the filing date. §404.630 states:

> "If a written statement, such as a letter, indicating your intent to claim benefits either for yourself or for another person, is filed with us under the rules stated in §404.614, we will use the filing date of the written statement as the filing date of the application, if...
>
> "(a) The statement indicates an intent to claim benefits [and]
>
> * * *
>
> "(c) The claimant files an application with us on an application form...within 6 months after the date of a notice we will send advising of the need to file an application."

Therefore, had the employees heeded

Mrs. Duthu's pleas, March, 1980 would have been the effective date of the benefits.

The questions presented herein merit the attention of this Court.

As noted by Justice Marshall in his dissent in Schweiker v. Hansen, supra, (Justice Brennan joining in the dissent), "The issue presented here is important, not only in economic terms to the respondent, but in constitutional terms as well." Id. at 791.

> "The question of when the Government may be equitably estopped has divided the distinguished panel of the Court of Appeals in this case, has received inconsistent treatment from other courts of appeals, and has been the subject of considerable ferment. See e.g., Corniel Rodriguez v. INS, 532 F.2d 301 (C.A.2 1976); United States v. Lazy FC Ranch, 41 F.2d 985 (C.A.9 1973); United States v. Fox Lake State Bank, 366 F.2d 962 (C.A.7 1966); Walsonavich v. United States, 335 F.2d 96 (C.A.3 1964); Simmons v. United States, 308 F.2d 938 (C.A.5 1962); Semaan v. Mumford, 118 USApp.D.C. 282, 335 F.2d 704 (1964); Eichelberger v. Commissioner of Internal Revenue, 88 F.2d 874 (C.A.5 1937). See generally K.

Davis, Administrative Law of the 70's, §17.01 (1976); Note, Equitable Estoppel of the Government, 79 Colum.L.Rev. 551 (1979). Indeed, the majority today recognizes that '[t]his Court has never decided what type of conduct by a government employee will estop the government from insisting upon compliance with valid regulations governing the distribution of welfare benefits.' Ante at 1470. The majority goes on to suggest that estoppel may be justified in some circumstances. Yet rather than address the issues in a comprehensive fashion, the court simply concludes that this is not such a case. The apparent message of today's decision-that we will know an estoppel when we see one-provides inadequate guidance to the lower courts in an area of the law that, contrary to the majority's view, is far from settled.

"Indeed, the majority's attempt to distinguish conflicting decisions of other courts itself demonstrates the impropriety of today's summary disposition. The majority declines to 'consider the correctness of these cases' and instead simply notes that they are distinguishable on their facts from the present case. Ante, at 1471 N.4. Yet the majority fails to explain why or how these purported factual distinctions affect the legal question of when the government may be equitably estopped. Thus, the lower courts are left guessing whether the factual differences cited

by the majority are of any real consequence." Id. at 791, 792.

As the Fifth Circuit noted in the decision appealed from, the efforts made by Mrs. Duthu to protect her children's rights exceeded the efforts made by the claimants in Hansen and Jones. Furthermore, and most importantly, the Fifth Circuit also found that the blunders of the SSA employees were more serious than the mistakes made by the government in Hansen and Jones. It is appellant's contention that faced with those facts, the Lower Court, in Justice Marshall's words, simply "guessed", and guessed wrongly, that the actions did not constitute "affirmative misconduct".

CONCLUSION

"It is very well to say that those who deal with the government should turn square corners. But there is no reason why the square corners should constitute a

one way street." Justice Jackson in Federal Crop Insurance v. Merrill, 332 U.S. at 387, 388, 68 S.Ct. at 4, 5. The "affirmative misconduct" of the SSA employees in the instant case prevented Mrs. Duthu from taking actions which resulted in a loss of great magnitude (over five years of children's insurance benefits to each of the Dugan children). This was not merely the case of an agent failing to "...follow instructions to the last detail..." Schweiker v. Hansen, supra, at 790. Here, the government, through its agents, engaged in egregious misconduct to the serious detriment of these two children. This is certainly the type of situation envisioned by the Fifth Circuit when it stated that estoppel might be appropriate if the "...public interest in insuring that the government can enforce the law free from estoppel [is]

outweighed by the counterveiling interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their government." Fano v. O'Neill, 806 F.2d 1262, 1265 (5th Cir. 1987), citing Heckler v. Community Health Services, 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984).

The Dugan children looked to be the beneficiaries of an insured wage earner, not recipients of handouts. As such, they are entitled to no less than a liberal and broad construction of the Social Security Act. Holmes v. Weinberger, supra, at 154. It is unthinkable that our purportedly beneficient government would use its own misconduct coupled with the hypertechnicalities of its regulations to deny benefits to two children who are unequivocally substantively entitled to them. The government should not be

allowed to use its own "affirmative misconduct" to deny benefits to those so justly entitled to them. As this Court noted in Giglio v. United States, 405 U.S. 150, 154-155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972), "Men naturally trust in their government, and ought to do so, and they ought not to suffer for it."

For these and the foregoing reasons, appellants respectfully urge that this Court grant certiorari and that ultimately the decision of the United States Court of Appeals for the Fifth Circuit be reversed, and that Kelly and James R. Dugan, II, be awarded benefits under the provisions of the Social Security Act, as amended, commencing March, 1980.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on all counsel of record by mailing a copy of same via U.S. Mail, postage prepaid, this 1 day of _____, 1990.

_____

APPENDIX

NOTE TO PROCESSING CENTER: FURTHER ACTION NECESSARY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF:	CLAIM FOR:
Janice Edmonson Duthu (Claimant)	Surviving Child's Benefits
James R. Dugan (Wage Earner)	435-72-2615 (Social Security Number)

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The specific issues in this case are whether Kelly Dugan, surviving child of the wage earner, is entitled to surviving child's benefits and whether James R. Dugan, II, surviving child of the wage earner is entitled to surviving child's benefits prior to May, 1985.

EVALUATION OF THE EVIDENCE

On December 16, 1985, Mrs. Janice Edmonson Duthu, formerly Janice Edmonson Dugan, ex-wife of the wage earner, filed a written application for child's insurance benefits on behalf of Kelly Dugan, date of birth October 11, 1964, and James R. Dugan, II, date of birth March 27, 1969, the natural children of the wage earner. (Exhibit 1, 2, 3, 11). Subsequently, on February 18, 1986, a special determination was made by the Social Security Administration that the wage

earner James R. Dugan had died in a plane crash on December 18, 1979. No body was ever recovered. (Exhibit 15).

On March 18, 1986, an initial determination was made that Kelly Dugan was not entitled to surviving child's benefits because she did not meet the age requirements during any of the months for which the application could apply. Additionally, it was determined that James R. Dugan, II was entitled to monthly benefits effective May, 1985. (Exhibit 16, 21).

On May 6, 1986, reconsideration was requested of the denial of benefits to Kelly Dugan and James R. Dugan's, II effective date of benefits, based on Ms. Duthu's claim that she had attempted to file a claim

for benefits in January, 1980 and was not permitted to do so by employees of the Social Security Administration. Reconsideration was denied on May 18, 1986 and the case was referred to an Administrative Law Judge on a request for hearing dated July 21, 1986. (Exhibit 21, 22).

At a hearing in New Orleans, Louisiana, on December 1, 1986, Ms. Janice Edmonson Duthu was sworn and testified that she contacted the Social Security Office in Houma, Louisiana via telephone in January, 1980, and inquired as to filing an application for surviving child's benefits on behalf of her children. She was informed by an unknown employee that she would not be able to file her application until she obtained sufficient evidence of the wage earner's

death or seven years lapsed since his date of disappearance. Subsequently in March, 1980, Ms. Duthu testified that she traveled to the Houma Social Security Office with her mother where she again attempted to make an application for benefits but was once again misinformed by an employee that she could not yet file. Additionally, when Ms. Duthu requested documentation of her visit to the office, she was informed that she would not need a record of her visit.

Approximately 2-3 years later, the claimant stated that she returned to the Houma Social Security Office and spoke with a Ms. Costanza, an employee of the office, who once again informed her that she would not be able to file an application without evidence of death or waiting seven years from the date of disappearance. The

claimant was not given a record of the visit. In September, 1985, Ms. Constanza (sic) allegedly repeated the same information. Ms. Duthu stated that she was finally informed in November, 1985, that the previous information supplied had been an error and that she could have applied for benefits in January, 1980.

Also testifying at the hearing was Mrs. Jean Edmonson, Ms. Duthu's mother, who confirmed that she had gone with her daughter in March, 1980 to the Houma Social Security Office where they were misinformed that they could not file an application for benefits without evidence establishing the wage earner's death or waiting seven years after his disappearance. She further testified that her daughter was told that she did not need a record of her visit noted.

Exhibit 27, which is a record of a telephone contact with Ms. Lynn Henry of the Social Security Office in Houma, Louisiana, on May 22, 1986, reports that the claimant was able to identify to a claims representative the employee she spoke with in January, 1980, who allegedly told that she was not able to apply at that time. Although the employee did not recall Ms. Duthu's visit, it is noted that the individual had been an employee of the Houma Social Security Office in 1980. Further investigation revealed that office records covering the period in question, January, 1980, which may have corroborated the claimant's allegations have been discarded.

After thoroughly reviewing the evidence of record, the Administrative Law Judge concludes that Kelly Dugan and James R.

Dugan, II, are entitled to surviving child's benefits effective March, 1989, the date their mother first personally appeared and made an oral application for benefits on their behalf. Both Mrs. Duthu and Mrs. Edmonson credibly testified that they were prevented from filing a written application on said date by an employee of tne Social Security Administration who also did not provide written confirmation of their visit when requested to do so. These actions amounted to "affirmative misconduct" by the employee on behalf of the Administration. Even though the employee, when identified, stated he could not recall Mrs. Duthu's office visit, he had been employed in that office in 1980. Considering the normally large turnover in office staff within a five year period, it is highly unlikely that Mrs. Duthu's selection was coincidental. Social

Security records which would have further substantiated Mrs. Duthu's testimony have been discarded by the Houma office.

Since March, 1980, Mrs. Duthu has taken all possible steps that she could in attempting to obtain benefits for her children. Although she did not file actual written application for benefits until December 16, 1985, her delay was due solely to her detrimental reliance on misinformation supplied by employees of the Social Security Administration. It would be a great injustice to the wage earner's children to limit the effective date of benefits to May, 1985.

Accordingly, the Administrative Law Judge specifically finds that Kelly Dugan and James R. Dugan, II are entitled to surviving

child's benefits based on their mother's oral application for benefits in March, 1980.

FINDINGS

After careful consideration of the entire record, the Adminitrative Law Judge makes the following specific findings:

1. Kelly Dugan and James R. Dugan, II, are the children of the wage earner, James Dugan.

2. The wage earner died on December 18, 1979.

3. The evidence of record establishes that Kelly Dugan and James R. Dugan, II, are entitled to

surviving child's benefits based on their mother's oral application for benefits in March, 1980, which was subsequently filed on December 16, 1985.

DECISION

It is the decision of the Administrative Law Judge that the claimants are entitled to surviving child's benefits on the record of the wage earner, effective March, 1980.

s/ J. Charles Collins, Jr.
J. Charles Collins, Jr.
Administrative Law Judge

May 18, 1987
Date

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION OF APPEALS COUNCIL

IN THE CASE OF:	CLAIM FOR:
Janice Edmonson Duthu for James R. Dugan, II and Kelly Dugan (Claimant)	Child's Insurance Benefits
James R. Dugan (Wage Earner)(Leave blank if same as above)	435-72-2615 (Social Security Number)

This case is before the Appeals Council under authority of sections 404.969 and 404.970(a)(2) of Social Security Administration Regulations No. 4 (20CFR 404.969 and 404.970(a)(2) for review and revision of the Administrative Law Judge's decision dated May 18, 1987 on the basis of an error of law with respect to the date of entitlement to child's insurance benefits.

In deciding to review the hearing decision, the Appeals Council considered a memorandum dated June 22, 1987 from the Mid-America Program Service Center, which is hereby entered into the record as Exhibit AC-1. The claimant and her representative were notified of the Appeals Council's action, of its proposed findings, and of the rights with respect thereto, by a letter dated July 17, 1987, a copy of which is hereby entered into the record as Exhibit AC-2. By letter dated July 22, 1987, which is hereby entered into the record as Exhibit AC-3, the representative responded to the Council's notice and requested an extension of time. The Council granted the extension in a letter dated August 6, 1987, a copy of which is hereby entered into the record as Exhibit AC-4. In a letter dated September 4, 1987, which is hereby entered into the record as

Exhibit AC-5, the representative presented additional argument in support of the claimant's position.

In his decision, the Administrative Law Judge found that James R. Dugan, II and Kelly Dugan are entitled to child's insurance benefits effective March 1980, based on an oral application filed in March 1980 which protected the filing date of the written application dated December 16, 1985.

Inasmuch as the Administrative Law Judge made no reference to the Social Security Act or attending Regulations No. 4 in his decision, the Appeals Council sets forth the pertinent provisions of the law below. The Appeals Council hereby adopts the Administrative Law Judge's statement of the evidentiary facts, but does not adopt the

Administrative Law Judge's inferences, findings and conclusions derived therefrom.

ISSUES

The issues before the Appeals Council are whether James R. Dugan, II and Kelly Dugan are entitled to child's insurance benefits on the wage earner's account and, if so, as of what date.

LAW AND REGULATIONS

Section 202(d)(1) of the Social Security Act provides in relevant part that:

> Every child (as defined in section 216(3)) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child-
>
> (A) has filed application for child's insurance benefits, (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 223(d)) which began

> before he attained the age of 22, and (C) was dependent upon such individual-...shall be entitled to a child's insurance benefit...

Section 404.610 of Social Security Administration Regulations No. 4 provides in relevant part that to be considered a claim for benefits, an application must generally be on an application form as described in 20 CFR 404.611, must be signed by the applicant or someone acting on his behalf, and must be completed and filed with the Social Security Administration.

Sections 404.611 and 404.614 provide in relevant part that an application must be on a prescribed form. An application or a written statement, request, or notice is filed on the day it is received by a Social Security Administration employee.

Section 404.630 provides in pertinent part that:

> If a written statement, such as a letter, indicating your intent to claim benefits either for yourself or for another person is filed with us under the rules stated in section 404.614, we will use the filing date of the written statement as the filing date of the application, if all of the following requirements are met:
> (a) The statement indicates an intent to claim benefits.
> (b) The statement is signed by the claimant, the claimant's spouse, or a person described in Section 404.612. If you telephone us and advise us that you intend to file a claim but cannot file an application before the end of the month, we will prepare and sign a written statement if it is necessary to prevent the loss of benefits.
> (c) The claimant files an application with us on an application form as described in section 404.611, or one is filed for the claimant by a person described in section 404.612, within 6 months after the date of a notice we will send advising of the need to file an application.

Section 404.621(a)(1)(ii) provides in relevant part that if you file an application for child's benefits, based on the earnings record of a person not entitled to disability benefits, after the first month you could have been entitled to them, retroactivity is limited to 6 months before the month in which your application is filed.

Section 404.720 sets forth when evidence of a person's death is required, and gives examples of evidence of death. Section 404.721 further provides in relevant part that:

> If you cannot prove the person is dead but evidence of death is needed, we will presume he or she died at a certain time if you give us the following evidence:
> (a) A certified copy of, or extract from, an official report or finding by an agency or

or department of the United States that a missing person is "presumed to be" dead as set out in Federal law (5 U.S.C. 5565). Unless we have other evidence showing an actual date of death, we will use the date he or she was reported missing as the date of death.

(b) Signed statements by those in a position to know and other records which show that the person has been absent from his or her residence for no apparent reason, and has not been heard from, for at least 7 years. If there is no evidence available that he or she is still alive, we will use as the person's date of death either the date he or she left home, the date ending the 7 year period, or some other date depending upon what the evidence shows is the most likely date of death.

EVIDENCE CONSIDERED

The Appeals Council has carefully considered all of the evidence of record, the testimony given, the arguments made, and the law and regulations pertinent to this case.

EVALUATION OF THE EVIDENCE

Janice Edmonson Duthu, the ex-wife of the wage earner and mother of his children,

James R. Dugan, II and Kelly Dugan, born on March 27, 1969 and October 11, 1964, respectively, filed an application for child's insurance benefits on the wage earner's account on December 16, 1985 (Exhibits 1, 2, 11). In connection with the application, the claimant presented documentation of the circumstances surrounding the wage earner's disappearance on December 18, 1979 which led her to believe he had died on that date (Exhibits 4-10, 12-14). The Administration determined that the wage earner was deceased, and awarded benefits to the claimant on behalf of James R. Dugan, II effective May 1985, but denied benefits to her for Kelly Dugan on the basis that Kelly was not a full-time student at an elementary or high school (Exhibits 16, 19.) The claimant appealed the denial of Kelly's claim and the date of entitlement for James,

asserting that entitlement for both children should be retroactive to the wage earner's death (Exhibits 17, 18). Upon reconsideration, the Administration found that, while the wage earner is presumed to have died in December 1979, retroactivity is limited to May 1985, or 6 months from the date of the protective filing in November 1985 (Exhibits 8, 20, 21). As of May 1985, Kelly did not meet the factors of entitlement for child's insurance benefits. On July 21, 1986, the claimant requested a hearing, stating that the Social Security Administration had given her misinformation and had refused to take a claim when she had first contacted the Administration in 1980 (Exhibit 22).

In his decision, the Administrative Law Judge found that the claimant was entitled to surviving child's insurance benefits on

behalf of James and Kelly Dugan effective March 1980 on the account of the wage earner who died on December 18, 1979. He reached this conclusion in part by considering that the claimant had filed an "oral application" on behalf of the children in March 1980, which protected the filng date of the written application subsequently on December 16, 1985.

The record reflects that the wage earner and another individual, both of whom were pilots, left Florida on December 18, 1979 bound for Caracas, Venezuela in a private airplane owned by the wage earner. It is believed that the plane developed engine trouble and that they sent out a distress signal, although there is no evidence of this. No remains of either the plane or its occupants were ever discovered (Exhibits 4-10).

None of the preferred evidence of death described in 20 CFR 404.720 was presented. However, signed statements were obtained from several individuals in a position to know, verifying that the wage earner has not been heard from since December 1979 (Exhibits 9, 12, 25-26). A newspaper account of the disappearance as well as documentation of numerous investigative attempts to obtain evidence of the presumed plane crash are in file. No earnings have been posted to the wage earner's account since 1979 (Exhibit 23). The Appeals Council concludes that the wage earner may be presumed to have died on December 18, 1979, within the meaning of 20 CFR 404.721.

The claimant and her representative contend that benefits to the children should be paid retroactively to the time of the wage

earner's death. They state that the Administration refused to take an application from the claimant when she first contacted them, provided misinformation to her, and now is denying the claimant benefits on behalf of her children to which she is entitled under the law (Exhibits 17-19, AC-3, AC-5).

Pursuant to sections 202(d) of the Act and 20 CFR 404.610, 404.611 and 404.614, as relevant to this case, in order to be entitled to child's insurance benefits, an application must be filed with the Social Security Administration. An application or a written statement, request or notice is filed on the day it is received by a Social Security Administration employee. A written statement will, under circumstances described in 20 CFR 404.614 and 404.630,

protect the filing date of an application, if the claimant files an application within 6 months.

The claimant may well have contacted the Social Security Administration as early as January or March 1980 to inquire about possible entitlement to benefits, although the Administration has no record of any contacts prior to November 1985 (Exhibits 17, 18, 22, 24, 27, testimony). Nevertheless, even if verification of these oral inquiries were in file, pursuant to the Supreme Court decision in Schweiker v. Hansen, published as Social Security Ruling 81-29c, (C.B. 1981, pp. 28-31), only a written application, not merely an oral inquiry, satisfies the requirements that one must file an application to be entitled to benefits. Moreover, even if it were also

established that the claimant had been given misinformation by the Administration, this would not estop the Administration from insisting upon compliance with the valid regulation requiring that applications for benefits must be in writing, as emphasized in Schweiker v. Hansen.

The representative has asserted that courts have held that the doctrine of estoppel is applicable to the government, and that the decision in Schweiker v. Hansen is not on point. However, the Supreme Court decision in Schweiker v. Hansen is applicable and binding in this case.

In November 1985, a written intent to file for benefits was recorded, followed within 6 months by a written application dated December 16, 1985. Pursuant to 20 CFR

404.621(a)(1)(ii), the application's retroactivity is limited to 6 months from the protected filing date of November 1985, or to May 1985. The Appeals Council concludes that May 1985 is the earliest possible date of entitlement to child's insurance benefits. As of that date, Kelly Dugan was neither disabled, under age 18, nor a full-time elementary or secondary school student under the age of 19. Therefore, she is not entitled to child's insurance benefits as set forth in section 202(d) of the Act.

FINDINGS

Based on the foregoing, the Appeals Council makes the following findings:

1. James R. Dugan, II, born on March 27, 1969, and Kelly Dugan, born on October 11, 1964, are children of the wage earner.

2. The wage earner is presumed to have died on December 18, 1979 (20 CFR 404.721).

3. A written statement of Janice Edmonson Duthu's intent to file for child's insurance benefits for James R. Dugan, II and Kelly Dugan was first recorded in November 1985.

4. The written intent was followed by an application dated December 16, 1985.

5. Janice Edmonson Duthu is entitled to child's insurance benefits on behalf of James R. Dugan, II effective May 1985.

6. Janice Edmonson Duthu is not entitled to child's insurance benefits on behalf of Kelly Dugan.

DECISION

It is the decision of the Appeals Council that Janice Edmonson Duthu is first entitled to child's insurance benefits on behalf of James R. Dugan, II effective May 1985, but that she is not entitled to child's insurance benefits on behalf of Kelly Dugan, based on an application protectively filed in November 1985. The decision of the Administrative Law Judge is modified accordingly.

APPEALS COUNCIL

s/ Burton Berkley
Burton Berkley, Member

s/ Vernell L. Dethloff, Jr.
Vernell L. Dethloff, Jr., Member

DATE: October 21, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JANICE EDMONSON DUTHU JAMES DUGAN, II AND KELLY DUGAN Plaintffs,	CIVIL ACTION
VERSUS	NO. 87-5229
OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES Defendant.	SEC. "G" (3)

FINDINGS AND RECOMMENDATIONS

Plaintiffs Janice Duthu, James Dugan, II and Kelly Dugan seek federal district court review pursuant to section 205(g) of the Social Security Act, 42 U.S.C. section 405 (g), claiming that the Secretary erred in in denying James and Kelly Dugan surviving child's insurance benefits under section 202(d)(1) of Title II of the Social Security Act, 42 U.S.C. section 402(d)(1) between March, 1980 to May, 1985. We find that the Secretary did err in concluding that Kelly Dugan was not entitled to any child

insurance benefits and that James Dugan was only entitled to child insurance benefits as of May, 1985. We therefore recommend that the plaintiffs' motion for summary judgment be granted and defendant's motion for summary judgment be denied.

PROCEDURAL HISTORY

On December 16, 1985, Janice Duthu, formerly Janice Dugan, ex-wife of the wage earner, filed a written application for surviving child's insurance benefits on behalf of James and Kelly Dugan, the natural children of the wage earner. Two months later, the Social Security Administration made a special determination that the wage earner, James Dugan, had died in a plane crash on December 18, 1979. On March 18, 1986, the Social Security Administration (SSA) made an initial determination that

Kelly Dugan was not entitled to surviving child's insurance benefits because she did ot meet the age requirements during the months for which the application applied. The SSA also determined tht James Dugan, II, was entitled to receive surviving child's insurance benefits effective May, 1985. The SSA upheld this determination on reconsideration and the case was referred to an administrative law judge for an administrative hearing and de novo review.

The administrative law judge held that the children were entitled to receive surviving child's insurance benefits effective March, 1980, based on Janice Duthu's oral application for benefits in March, 1980. By its own motion, the Appeals Council reviewed and modified the decision of the ALJ, holding that Kelly Dugan was not

entitled to receive any benefits, while James Dugan was entitled to receive benefits only as of May, 1985. This decision became the Secretary's final decision.

FACTS

In December, 1979, Mrs. Duthu learned that her former husband had disappeared en route to Venezuela and was presumed dead as a result of a plane crash. In January, 1980, Mrs. Duthu telephone the Social Security office in Houma, Louisiana, and inquired about filing an application for surviving child's insurance benefits on behalf of her two children. She was erroneously informed by an unknown employee that she could not file until she had obtained more evidence of the wage earner's death and that she would have to wait seven years to file without evidence of his death.

Ad. R. 25.

Mrs. Duthu went to the Social Security office in March, 1980 with her mother. She was told by an employee that filing an application without evidence of her former husband's death "wouldn't do any good...it would just run through the office and come right back and it just wouldn't be turned in." Ad. R. 27. When Mrs. Duthu asked the employee to make a written record that she had attempted to file and intended to do so when she obtained evidence of Mr. Dugan's death, he told her that it would not do any good because writing something in the record would not be noticed by the office until she produced evidence of her former husband's death. Ad. R. 27-28. Although she could not recall the name of the employee who had given her this misinformation, her descrip-

tion fit an employee who had worked in that office in May, 1980. She later identified him by sight during a subsequent visit to the office. Ad. R. 89.

Mrs. Duthu returned to the office two to three years later and again attempted to file an application for surviving child's insurance benefits. Mrs. Castanza, an employee at the office, told her that she could not file an application until she produced evidence of the wage earner's death. Again she insisted that Mrs. Castanza make a written record of her visit and her attempt to file and again she was told that it would not do any good and that it would waste Social Security's time. Ad. R. 29.

Believing that seven years had passed since Mr. Dugan's disappearance, Mrs. Duthu

returned to the Social Security office in October, 1985. Mrs. Castanza informed her that she could not file for one more year. Mrs. Duthu again asked Mrs. Castanza to make a written record of her attempt to file but Mrs. Castanza refused. Ad. R. 30.

Mrs. Duthu then contacted Mrs. Tregg at the Social Security office who told her that she could file immediately and that she could have applied for benefits in January, 1980. Ad. R. 30-32. As a result of the Report of Contact filed in November, 1985, James Dugan, II, was deemed entitled to retroactive benefits only as of May, 1985, under 20 C.F.R. section 404.621(a)(1)(ii). Mrs. Duthu's daughter, Kelly Dugan, was denied benefits altogether because she did not meet the age requirements during any of the months for which the application applied.

LAW AND ANALYSIS

The ALJ found that Mrs. Duthu's visit to the Social Security office in March, 1980 and her attempt to file constituted an oral application for benefits, making the children entitled to benefits as of that date. The ALJ also found that the employees' failure to make requested written confirmations of her attempts to file in March, 1980 and against two to three years later, and on a third occasion in October, 1985, constituted affirmative misconduct on behalf of the SSA, estopping it from denying the children benefits for failure to comply with SSA regulations requiring the filing of a written application.

The Appeals Council overruled the ALJ's decision based on SSA regulations that require a claimant to file a written application in order to receive benefits.

Section 404.603(b) reads:

> In addition to meeting other requirements, you must file an application to become entitled to benefits. If you believe you may be entitled to benefits, you should file an application. Filing an application will --
>
> (b) Protect your entitlement to any benefits that may be payable for as many as 6 months or 12 months. . . before the application was filed.

Additionally, section 404.614(a) states that an application or a written statement, request, or notice is filed the date it is received by an SSA employee. The date that notice of intent to file an application is received by an SSA office can be treated as the filing date. Section 404.630 states:

> If a written statement, such as a letter, indicating your intent to claim benefits either for yourself or for another person is filed with us under the rules stated in § 404.614, we will use the filing date of the written statement as the filing date of the application, if. . .

> (a) The statement indicates an intent to claim benefits [and]
>
> ***
>
> (c) The claimant files an application with us on an application form . . . within 6 months after the date of a notice we will send advising of the need to file an application.

The issue before us is whether the refusal by two Social Security employees on three separate occasions to make a written confirmation of Mrs. Duthu's attempt to file an application constitutes affirmative misconduct so that the SSA would be estopped from denying benefits for failure to file a written application. If the employees had made a written confirmation of Mrs. Duthu's attempt to file, the SSA would have used that date as the application date under section 404.614, enabling the children to receive benefits effective as early as March, 1980.

The Supreme Court has held that a person asserting estoppel against the government has a very heavy burden to bear. Heckler v. Community Health Services, 467 U.S. 51, 60, 104 S.Ct. 2218, 2224 (1984). To succeed, the claimant must prove the four traditional elements of estoppel and must also show affirmative misconduct on the part of the government. INS v. Hibi, 414 U.S. 5, 94 S.Ct. 19, (1973). The Court "has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations . . ." Schweiker v. Hansen, 450 U.S. 785, 788, 101 S.Ct. 1468, 1471 (per curiam), reh'g denied, 451 U.S. 1032, 101 S.Ct. 3023 (1981). Therefore, whether an instance of misconduct amounts to affirmative misconduct sufficient to estop the government must be decided on a case-by-case basis.

In Hansen, an SSA employee gave the claimant erroneous information by telling her that she was not eligible for mother's insurance benefits. The employee also failed to recommend that she file anyway and did not tell her the advantages of doing so, in contravention of internal administration guidelines for SSA employees. The Court held that the employee's failure to advise the claimant to file did not constitute affirmative misconduct:

> Congress expressly provided in the Act that only one who "has filed an application" for benefits may receive them, and it delegated to petitioner the task of providing by regulation the requisite manner of application. A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.
>
> In sum, Connelly's errors "fal[l] far short" of conduct

> which would raise a serious question whether petitioner is estopped from insisting upon compliance with the valid regulation.

Hansen, 450 U.S. at 790, 101 S.Ct. at 1472.

The Fifth Circuit recently addressed this issue in Jones v. Dept. of Health & Human Services, 843 F.2d 851 (5th Cir. 1988). In Jones, the plaintiff made a telephone call to an SSA Teleservice representative in 1983, inquiring as to whether she was eligible for early retirement benefits and whether she would be entilted to divorced-spouse's benefits. She was erroneously told that if she accepted retirement benefits on her own employment record, she would be barred from receiving divorced spouse's benefits, for which she would be eligible in 1985. Relying on this misinformation, she did not apply for benefits until 1984. At that time, she was

told that she could have received early retirement benefits in 1983 and that it would not have disqualified her from receiving divorced spouse's benefits. Her failure to apply for those benefits in 1983 prevented her from receiving them in 1985. She claimed that the SSA should have been estopped from denying her the benefits because she had relied to her detriment on the misinformation given by SSA employees.

Citing Hansen, the Fifth Circuit held in favor of the SSA because "erroneous oral statements by a government agent, without more, are insufficient to apply estoppel." Jones and the Supreme Court's decision in Hansen preclude a finding of estoppel under the facts of this case. For the following reasons, we disagree and find that the SSA should be estopped from denying the claimed benefits.

which working people could rely to provide for themselves and their dependents in old age. It is essential, therefore, that the Act be liberally construed and applied." Holmes, 423 F. Supp. at 154.

The Seventh Circuit's decision in Cheers, supra, limited the holding in Holmes but carved out an exception to apply in those cases where the ALJ found the claimant's testimony concerning the attempt to file to be credible:

> The most important distinguishing feature between these two cases, of course, is that in Holmes the ALJ specifically stated that he had "listened to and observed [the claimant's testimony] and [had] no reason to doubt that she made the inquiries alleged. . . . In the present case, on the other hand, the ALJ specifically found that there was no persuasive evidence to support the appellant's claim that he had actually inquired about his benefits prior to 1976. . . In light of 42 U.S.C. 405 (g), which states that these findings of fact and credibility determina-

> tions are binding upon us if supported by substantial evidence, which we believe they are in the present case, we find the Holmes decision is inapposite to the present controversy.

Cheers, 610 F.2d at 468. It should be noted that the Supreme Court in Hansen cited Cheers with approval. See Hansen, 450 U.S. at 789, 101 S.Ct. at 1471.

The post-Hansen decision that follows Holmes and employs the exception laid out in Cheers is McDonald, supra. In McDonald, the claimant inquired in 1975 about her eligibility for retirement insurance benefits when she reached age 62. In a written response from the SSA, she was informed that according to SSA calculations, she would need to acquire more calendar quarters of work before she could become eligible at age 62. When she took her husband to the SSA office in 1979 to apply for his disability benefits, she was informed that the SSA's

original calculations had been inaccurate and that she could have applied for retirement benefits in November, 1978 when she had reached age 62.

The ALJ held that the SSA was estopped from denying her the benefits to which she had been entitled in November, 1978. The Appeals Council reversed, holding that she was only entitled to benefits as of August, 1979, the month of her application. The District Court reversed, noting that the Supreme Court in Hansen had left open the possibility that the government could be estopped but the issue of what constitutes affirmative misconduct could only be decided on a case-by-case basis. McDonald, 537 F. Supp. at 50.

Applying the exception laid out in Cheers, supra, the court held that the SSA could be estopped because the ALJ had found

the claimant's testimony concerning the SSA's misrepresentation of her eligibility to be credible. The court also relied on a Ninth Circuit decision in which it held that "before invoking the doctrine of estoppel we ask whether the citizen dealing with the government has acted diligently to protect his own interests. Lavin apparently did not attempt to confirm the recruiter's representations by either reading the mandatory retirement provisions, or by requesting a written statement setting forth his eligibility." Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981) (emphasis added). In McDonald, the court believed that the claimant had no way of knowing whether the SSA's calculations of calendar quarters of work were correct. Additionally, she could not have taken any action to avoid the consequences of the SSA's mistake because filing an

application on the basis of the SSA's calculations would have been denied. The court felt that those two factors, combined with the credibility determinations made by the ALJ, compelled a holding of estoppel against the SSA.

The facts of this case and the law discussed above convince us that the SSA should be estopped from denying Kelly Dugan all the benefits to which she is entitled and from denying James Dugan benefits from March, 1980 through May, 1985. The ALJ specifically found the testimony concerning the claimant's attempt to file to be credible, bringing it within the exception discussed in Cheers:

> Both Mrs. Duthu and Mrs. Edmonson [Mrs. Duthu's mother] credibly testified that they were prevented from filing a written application on said date by an employee of the Social Security Administration who also did not provide written

> confirmation of their visit when requested to do so. . . . Even though the employee, when identified, stated he could not recall Mrs. Duthu's visit, he had been employed in that office in 1980. Considering the normally large turnover in office staff within a five year period, it is highly unlikely that Mrs. Duthu's selection was coincidental. Social Security records which would have further substantiated Mrs. Duthu's testimony have been discarded by the Houma office.

Ad. R. 13.

Crucial to our finding of estoppel in this case is the fact that Mrs. Duthu asked three times to have a written record made of her visits to the Social Security office. As the Ninth Circuit held in Lavin, supra, estoppel should not be invoked against the government unless the citizen attempted to protect her interests by getting a written record from the government employee setting forth her eligibility. We do not see what more Mrs. Duthu could have done to protect

her children's interests. On three separate occasions, she was prevented from filing an application in direct contravention of section 404.603(b) and was refused a written record of her visit.

As pointed out, the Fifth Circuit recently held that giving out oral misinformation, without more, does not rise to the level of misconduct that would suffice to estop the government. Jones, 843 F.2d at 853. The distinction between Jones and the instant case turns on the actions by the two SSA employees. Not only did they give plaintiff erroneous information, but they affirmatively thwarted Mrs. Duthu's attempts to comply with SSA regulations and prevented her from protecting her children's interests. Their conduct certainly amounted to more than "mere negligence, delay, inaction, or failure to follow internal

agency guidelines." Fano v. O'Neill, 806 F.2d 1262, 1265 (5th Cir. 1987). Allowing the SSA to deny Mrs. Duthu's children five years of benefits for failing to comply with the regulations through no fault of her own, but because of arbitrary and misleading conduct on the part of the SSA employees, would not only conflict with the liberal construction to be given to the Social Security Act but would be unwarranted under the law of estoppel and would result in a grave miscarriage of justice to the children of the deceased wage earner.

RECOMMENDATION

ACCORDINGLY, it is recommended that defendant's motion for summary judgment be DENIED and that plaintiff's motion for summary judgment be GRANTED.

Failure to file written objections to the proposed findings and recommendation

contained in this report within ten (10) days of the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 667 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 2d day of September, 1988.

s/ Jacob J. Meyer
JACOB J. MEYER
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JANICE EDMONSON DUTHU, JAMES DUGAN, II AND KELLY DUGAN Plaintiffs,	CIVIL ACTION NO. 87-5229
VERSUS	SEC. "G" (3)
OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES Defendant.	

ORAL REASONS FOR JUDGMENT RENDERED BY THE HONORABLE MOREY L. SEAR ON OCTOBER 12, 1988

THE COURT: I wish, Mrs. Smitko, that she had come to see you then. Let me, if you will permit me, to review what I think the law is and tell you how I think we come out in this case. Have a seat. It will take me a couple of minutes, and this will Obivate the necessity of me having to spend the time writing later. I think

that MCDONALDS versus SCHWEIKER, as you suggest, Mrs. Smitko, raise some questions as to what kind of misconduct must be considered, but we know that. Rather than rely on the District Court in Indiana for guidance here, I think that it is more appropriate that we look both to the doctrine that the Supreme Court provides us in cases that it has considered, but also that which the 5th Circuit teaches us in applying those doctrines. If we go back to HECKLER versus THE COMMUNITY HEALTH SERVICES just four years ago, the Supreme Court held that a person asserting estoppel against the Government has a very heavy burden to bear, and the Court has never decided what type of conduct of a Government employee will estop the Government from insisting upon compliance

with valid regulations governing the distribution of welfare benefits, and that's the essence of SCHWEIKER versus HANSEN. And two cases involving the denial of citizenship the Supreme Court has declined to decide whether even affirmative misconduct would estop the Government from denying citizenship, because in neither case was affirmative misconduct involved.

Now, the Court has recognize, however, the duty of all Courts to observe the conditions defined by Congress charging the public treasury. In HANSEN a Social Security Administration employee gave the claimant erroneous information by telling her that she was not eligible for mothers insurance benefits. The employee also failed to recommend that she file

anyway, and she didn't tell her the advantage of doing that, in contravention of internal administration guidelines of the Social Security Agency for there employees. Nevertheless, the Court held that the employee's failure to advise the claimant to file didn't constitute affirmative misconduct, and in HANSEN the Court said this, "Congress expressly provided in the Act that only one who has filed an application for benefits may received them, and it delegated the petitioner the task of providing by regulation the requisite manner of application. The Court, "that's me," is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of

benefit. In some, Conley's errors, the employee, falls far short of conduct which would raise a serious question where the petitioner is estopped from insisting upon compliance with a valid regulation."

Now, more recently, the 5th Circuit in JONES versus THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, this issue was raised. In JONES the plaintiff made a phone call to Social Security to there Kelly Service representative. She did that in 1983. She inquired as to whether she was eligible for early retirement and whether she would be entitled to divorced spouses benefits as well. She was erroneously told that if she accepted retirement benefits on her own employment record, she would be barred from receiving divorced spouses benefits, for which she would be

eligible in 1985. So relying on that misinformation, she didn't apply for benefits until 1984. At that time she was told that she could have received early retirement benefits in 1983, and that it would not have disqualified her from receiving divorced spouses benefits. Her failure to apply for those benefits in 1983 prevented her from receiving them in 1985. Now, citing HANSEN, the 5th Circuit held in favor of the administrator of the Social Security administration, because it said erroneous oral statements by a government agent, without more, are insufficient to apply estoppel. Yet the Court noted that Mrs. Jones had been mislead and that she was unjustifiably denied her rights for benefits at a time when she seriously needed the money. The

Court said, nevertheless, we are bound to follow HANSEN, which in effect holds that the SSA can deny benefits for failure to follow agency rules to one who obediently follows the rules communicated to her by the agency. Such is life in the post 1984 Orwellian Bureaucracy. These cases clearly indicate, I think, that the Magistrates ruling is clearly erroneous and contrary to law.

Accordingly, the objections of the Secretary to the report of the Magistrate are allowed, and the report of the Magistrate and his recommendation denied for the reasons set out.

* * *

Janice Edmonson DUTHU,
Plaintiff-Appellant,

v.

Louis W. Sullivan, M.D., Secretary
of Health and Human Services,
Defendant-Appellee.

No. 88-3841

United States Court of Appeals,
Fifth Circuit.

October 16, 1989.

Mother applied for social security surviving child insurance benefits on behalf of her children. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., affirmed decision of Social Security Administration Appeals Council denying benefits prior to date determined in accordance with regulations, and mother appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that government was not

estopped from asserting regulations limiting commencement period of surviving children's insurance benefits under social security to six months prior to filing of complaint, on grounds that Social Security Administration personnel had erroneously informed her she could not file application until father of children was officially declared dead, causing mother to delay filing of application for over five years.

Affirmed.

1. Estoppel 62.2(3)

Erroneous oral statements by government agent, without more, are insufficient to estop government from asserting regulatory bar to recovery of social security benefits.

2. Estoppel 62.2(4)

Government was not estopped to enforce regulations limiting recovery of social security surviving child insurance benefits to the period beginning six months prior to application for such benefits, in case where social security administration officials had informed wife of that application could not be filed for seven years because she could not produce evidence of death of missing husband, and she delayed filing of application for over five years, losing considerable benefits entitlment; alleged refusal of social security office employees, on each of three visits to their offices, to issue written confirmation of her visits did not constitute action over and above erroneous oral statements which would be sufficient to invoke estoppel. Social Security Act,

§ 202(d)(1)(A), 42 U.S.C.A. § 402(d)(1)(A); Social Security Administration Regulations, §§ 404.603, 404.610, 404.611.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before KING, JOLLY and DUHE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Because of her unfamiliarity with the intricacies of Social Security Act and Social Security Administration ("SSA") regulations, Janice Duthu relied on erroneous information given to her by SSA employees, resulting in the loss of approximately five years of benefit

payments due to her children. Mrs. Duthu contends that it is inequitable for the SSA to deny those benefits on the basis of her lack of knowledge of the technicalities of rules with which the SSA's own employees are unfamiliar. We sympathize with Mrs. Duthu and her children, and acknowledge the irony of a bureaucratic system which, in effect, may require laypersons to know more about SSA regulations than the SSA's own employees are required to know. Nevertheless, the SSA's actions were not of the character to estop the SSA from requiring compliance with its regulations.

I.

In December 1979 Janice Duthu learned that her children's father, her former husband James R. Dugan, had disappeared en

route to Venezuala and was presumed dead as a result of a plane crash. In January 1980 Mrs. Duthu telephoned the SSA office in Houma, Louisiana, and inquired about filing an application for surviving child's insurance benefits on behalf of her two children. An employee erroneously informed her that she could not file an application for benefits until she obtained more evidence of her ex-husband's death, and that, without evidence of her ex-husband's death, she would have to wait seven years to file.

Mrs. Duthu did not accept this answer as final word. In March 1980 Mrs. Duthu, with her mother along, went to the SSA office and an employee told them that it would be futile to file an application without evidence of her former husband's death. When Mrs. Duthu asked the employee

to make a written record that she had attempted to file and that she intended to do so when she had evidence of Mr. Dugan's death, he told her that such a written record would not be noticed by the SSA office.

About two or three years later, with hope rising from desparation, Mrs. Duthu returned to the SSA office yet again, and attempted once more to apply for surviving child's insurance benefits. Another SSA employee, identified by her as Mrs. Castanza, told her that she could not apply until she produced evidence of Mr. Dugan's death. Mrs. Duthu insisted that Mrs. Castanza make a written record of her visit and attempt to file, but Mrs. Castanza told her that such a record would not do any good and would waste the SSA's time.

Finally, believing that seven years had passed since Mr. Dugan's disappearance, Mrs. Duthu returned to the SSA office in October 1985. Mrs. Castanza informed her that she could not file for one more year. Mrs. Duthu again asked Mrs. Castanza to make a written record of her attempt to file; again, Mrs. Castanza refused.

After hearing of Mrs. Duthu's plight and frustrations, a friend suggested that she contact Mrs. Tregg, an SSA administrator. In November 1985 Mrs. Tregg told Mrs. Duthu that she could file for benefits immediately, and that she could have applied for benefits in January 1980, when Mrs. Duthu first telephoned the SSA to inquire about filing for benefits.

II.

On December 16, 1985 Mrs. Duthu filed a formal written application for surviving child's insurance benefits on behalf of her children James and Kelly Dugan. The SSA ruled that their father died in plane crash on December 8, 1979; that Kelly was not entitled to surviving child's insurance benefits because she did not meet the age requirements during the months for which the application applied (May through November 1985); and that James was entitled to receive surviving child's insurance benefits effective May 1985. The SSA upheld this determination on reconsideration and the case was referred to an administrative law judge ("ALJ") for an administrative hearing and de novo review.

The ALJ found that the actions of the SSA employees constituted affirmative

misconduct, and held that the government was estopped from requiring compliance with its regulations requiring filing of a written applicaition. The ALJ determined that the children were entitled to receive surviving child's insurance benefits effective March 1980 based on Mrs. Dutnu's oral application for benefits at that time. On its own motion, the Appeals Council reviewed and modified the ALJ's decision, holding that Kelly was not entitled to receive benefits only as of May 1985.

Mrs. Duthu, Kelly, and James sought review in district court. Their case was referred to a magistrate, who recommended that summary judgment be entered in the their favor. The district court sustained the Secretary's objection to the magistrate's recommendation and granted

the Secretary's motion for summary judgment.

III.

Mrs. Duthu and her children appeal to this court, contending that the actions of the SSA employees constituted affirmative misconduct estopping the Secretary from enforcing the regulation requiring written application for benefits. The applicable law, however, supplies us with no basis for affording relief to Mrs. Duthu for the ineptitude of the government's employees.

Under the Social Security Act, the filing of a formal application for child's insurance benefits is a prerequisite to the receipt of such benefits. 42 U.S.C. § 402(d)(1)(A). The application must be in writing and on form prescribed by the Secretary. 20 C.F.R. § 404.610, 404.611.

Because Mrs. Duthu did not file a written application until December 1985, her children cannot claim benefits for a period in excess of six months prior to that date. 20 C.F.R. § 404.603. Mrs. Duthu argues, however, that the Secretary should be estopped from denying benefits to her children for the period from March 1980 (the date of her first visit to the SSA office) to December 1985 because her failure to file a written application was the result of misconduct on the part of SSA employees.

[1,2] A private individual asserting estoppel against the government bears a heavy burden. Heckler v. Community Health Services, 467 U.S. 51, 60, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984). Erroneous oral statements by a

government agent, without more, are insufficient to apply estoppel. Id. at 64, 104 S.Ct. at 2226. In a case involving somewhat similar circumstances, the Supreme Court held that an SSA field representative's erroneous oral statements regarding an applicant's eligibility, and the representative's failure to recommend that the applicant file a written application, did not estop the SSA from denying retroactive retirement benefits under 42 U.S.C. § 402(j). See Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981).

In a recent Fifth Circuit case involving facts similar to those in Hansen and the instant case, we followed Hansen and held that the SSA can deny benefits for failure to follow agency rules even to one who obediently follows the

instructions communicated by the agency. See Jones v. Department of Health and Human Services, 843 F.2d 851, 854 (5th Cir.1988).

Mrs. Duthu argues that the instant case is factually distinguishable from Hansen and Jones. She argues that, in addition to giving her oral misinformation, and failing to advise her of the advantages of filing an application, the SSA employees refused to provide written confirmation of her visits. Mrs. Duthu contends that these actions are sufficiently more egregious that the conduct at issue in Hansen and Jones to constitute the type of "affirmative misconduct" necessary to estop the government from insisting on compliance with valid regulations governing the distribution of welfare benefits.

The record supports Mrs. Duthu's contention that her efforts to protect her children's rights exceeded the efforts made by the claimants in Hansen and Jones. Mrs. Duthu telephoned the SSA office once, and made three separate visits to the SSA office in an attempt to secure benefits for her children. She was told that it would be useless to file an application and that it would be a waste of the government's time if she did so. At the conclusion of each of three visits to the SSA office she requested and was refused written confirmation of her visit. In contrast, the plaintiff in Hansen met with an SSA representative only once; the plaintiff in Jones and her sister each made only one telephone call to an SSA teleservice center.

We cannot escape the fact, however, that Mrs. Duthu did not file a written application for benefits until December 1985. Although her failure to file the application is explained by the SSA employees' erroneous statements to the effect that filing would be futile and a waste of time, there is no contention here that the SSA actually refused a specific request to make a written application, which conduct might have constituted the sort of affirmative misconduct required for assertion of the doctrine of estoppel. As sympathetic as we are to Mrs. Duthu's position, we find that the blunders of the SSA employees, although more serious than the mistakes made by the government in Hansen and Jones, were simply not of the character to overcome the well-established rule of Hansen that a government

employee's misinformation and ineptitude will not estop the government from requiring a written application for benefits.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

FILED
APR 9 1990
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CLERK

No. 89-1148

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANICE EDMONSON DUTHU, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Social Security Administration may be estopped from enforcing its regulation requiring a written application for child insurance benefits because agency employees orally misinformed a claimant about her children's eligibility and declined to make a written record of her inquiry.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 62a-78a) is reported at 886 F.2d 97. The opinion of the district court (Pet. App. 55a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1989. The petition for a writ of certiorari was filed on January 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Janice Edmonson Duthu claims that because of erroneous information she received from

employees of the Social Security Administration (SSA), she failed to file a written application for Social Security child's insurance benefits for her children, James Dugan II, and Kelly Dugan. Consequently, they lost approximately five years of benefit payments for which they otherwise would have been eligible. Under the Social Security Act, the filing of a formal application for child's insurance benefits is a prerequisite to receipt of such benefits. 42 U.S.C. 402(d)(1)(A) (1982 & Supp. V 1987). The application must be made in writing. 20 C.F.R. 404.610, 404.611. Because petitioners did not file a written application until December 1985, they cannot claim benefits for a period in excess of six months prior to that date *i.e.*, before May 1985. *See* 42 U.S.C. 402(j)(1)(B); 20 C.F.R. 404.603.

In an administrative proceeding, petitioners asserted that it was inequitable for the agency to deny benefits to the Dugan children beginning in March 1980, because on that date and several times thereafter, agency employees had erroneously informed Mrs. Duthu that her children were not eligible for such benefits. In addition, petitioners alleged that the employees had responded to Mrs. Duthu's requests that a written record be made of her inquiry by telling her that such an effort would be futile. Based on these assertions, petitioners claimed that the agency should be estopped from requiring compliance with the regulations requiring filing of a written application for benefits. The Appeals Council of the SSA rejected petitioners' claim for benefits for the period before May 1985.[1]

---

[1] The agency granted benefits from that date to one of Mrs. Duthu's children, petitioner James Dugan II (Pet. App. 28a);

On review, the district court granted the Secretary's motion for summary judgment and upheld the agency's decision. Pet. App. 55a-61a. The court of appeals affirmed. Pet. App. 62a-78a. Relying on the established principle that the federal government may not be estopped on the same terms as other litigants, the court held that the erroneous oral statements by SSA employees and their declining to give Mrs. Duthu written confirmation of her visit did not constitute the type of affirmative misconduct that might permit estoppel of the government. Pet. App. 73a-78a.

ARGUMENT

The court of appeals correctly refused to estop the Secretary based on petitioners' allegations. Indeed, this Court has consistently refused to estop the government from enforcing the public laws.[2] This case fits easily within those decisions. Furthermore, because recent legislation has greatly reduced the like-

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it denied benefits to Mrs. Duthu's other child, petitioner Kelly Dugan, on the ground that Kelly did not meet statutory eligibility criteria even after May 1985. Pet. App. 27a.

[2] See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber Nat'l Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183-184 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Miranda*, 459 U.S. 14 (1982).

lihood that a claimant in petitioners' situation will in the future be left without a remedy, review by this Court is especially unwarranted in this case.

1. The government cannot be estopped from enforcing the law unless Congress has waived the sovereign immunity of the United States to permit the assertion of such a claim. In addition, estopping the government violates fundamental principles of separation of powers by requiring that misrepresentations by Executive Branch officials be given the force of law, thereby overriding specific statutory mandates enacted by Congress. As this Court observed in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), permitting the government to be estopped in circumstances similar to those present in this case would put it

> "at risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of the written application requirement[,] which experience has taught to be essential to the honest and effective administration of the Social Security Laws."

Id. at 789-790 (quoting *Hansen* v. *Harris*, 619 F.2d 942, 956-957 (2d Cir. 1980) (Friendly, J., dissenting)). The violation of separation of powers principles would be especially severe where, as here, estopping the government would result in the expenditure of public funds contrary to express congressional mandate, as required by the Appropriations Clause. U.S. Const. Art. I, § 9, Cl. 7; see *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947). Finally, estopping the government disserves the public interest: it would fuel litigation characterized by problems of proof (a problem this case

exemplifies) and would expose the government with its millions of employees to an uncontrolled and potentially huge liability.

None of these obstacles to estopping the government is affected in the least by the degree of "misconduct" attributed to a government employee. Our arguments on these points are spelled out at greater length in our brief on the merits in a case presently pending before this Court, *Office of Personnel Management* v. *Richmond*, No. 88-1943 (argued Feb. 21, 1990).[3]

2. This case need not be held for the decision in *Richmond*, because even if the government could be estopped in certain cases, this would not be one of them. In *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), this Court held that erroneous oral statements by an SSA employee concerning an applicant's eligibility combined with the employee's failure to recommend the filing of a written application for benefits were insufficient to estop the SSA from denying retroactive benefits under 42 U.S.C. 402(g) (1982 & Supp. V 1987). See also *Heckler* v. *Community Health Services*, 467 U.S. 51, 64 (1984). Under *Schweiker* v. *Hansen*, *supra*, the decision below is plainly correct.

In this case, as in *Hansen*, a claimant was given misinformation about eligibility for benefits. Here, as there, no claim is made that the error was intentionally or malevolently made. And in this case, as in that, the error did not cause petitioners "to take action, or fail to take action, that [petitioners] could not correct at any time." *Hansen*, 450 U.S. at 789 (citations omitted).

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[3] A copy of our opening brief in the *Richmond* case has been provided to counsel.

Unlike in *Hansen*, Mrs. Duthu was given the same misinformation on three occasions. But the fact that one office was consistently mistaken about a point of law does not make the behavior of its employees qualitatively worse. As in *Hansen*, it is still the type of behavior that falls " 'far short' of conduct which would raise a serious question whether [the government] is estopped from insisting upon compliance with the valid regulation." *Hansen*, 450 U.S. at 790.[4]

Petitioners also claim that SSA employees declined to make a written record of Mrs. Duthu's visits, telling her that such a record would be futile. Pet. App. 67a-69a. In fact, the Appeals Council of the SSA noted that written verification of petitioner's oral inquiries would not satisfy the agency's application requirement. Pet. App. 25a. Rather, only a written "statement, request, or notice" (20 C.F.R. 404.614), "indicating [an] intent to claim benefits"

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[4] Indeed, this Court has held that even highly blameworthy behavior—that which amounts to "an affirmative undertaking to waive or surrender a public right" (*United States* v. *Stewart*, 311 U.S. 60, 70 (1940))—is not sufficient to justify estopping the government. This Court has already identified conduct more egregious than that alleged in this case as behaviour that does not rise to the level of "affirmative misconduct." Compare *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973) (no affirmative misconduct where government failed fully to publicize rights under statute and to station authorized naturalization representative in the Philippines); *INS* v. *Miranda*, 459 U.S. 14, 19 (1982) (no affirmative misconduct where INS failed to act on visa petition for 18-month period, during which delay foreigner lost claim to permanent resident alien status); *Montana* v. *Kennedy*, 366 U.S. 308 (1961) (no affirmative misconduct where consular official erroneously advised petitioner's mother she could not travel to U.S. because of pregnancy, and petitioner consequently lost claim to American citizenship by birth).

and properly signed by the claimant (or, in this case, parent) would have sufficed (20 C.F.R. 404.630, 404.612). In any event, this behavior by SSA employees also falls "far short" of affirmative misconduct.[5]

3. This Court's review is also unwarranted because cases like the present one are unlikely to recur. Congress has recently enacted a statutory remedy for persons who fail to apply for benefits from SSA by reason of misinformation received from SSA employees. See Omnibus Budget Reconciliation Act (OBRA) of 1989, Pub. L. No. 101-239, § 10302(a), 103 Stat. 2481-2482. Section 10302(a) provides:

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[5] Petitioners assert that SSA employees "*prevented* [Mrs. Duthu] from filing an application." Pet. 34. We assume that petitioners refer to the SSA employees' declining to make a written record of Mrs. Duthu's inquiry since, in petitioners' view (which, as we have indicated, is mistaken), such a record would have been sufficient to constitute an "application" for benefits. See Question Presented, Pet. i.; Pet. App. 77a ("[T]here is no contention here that the SSA actually refused a specific request to make a written application.").

Even if petitioners' claim refers to more affirmative steps taken by SSA employees to discourage the filing of an application, that unidentified behavior fails to reach the level of "affirmative misconduct." In *INS* v. *Hibi*, *supra*, the Executive Branch removed the only authorized naturalization official from the Philippines for a significant period of time in which a law allowing certain foreign war veterans to become naturalized Americans under liberalized criteria was in effect. *Hibi*, 414 U.S. at 8-9. Thus, in order to apply for naturalization, an eligible Filippino would have had to leave his country to find a naturalization official. In the instant case, petitioners could have applied at any time simply by going to another SSA office or mailing in a statement. This Court ruled that the conduct in *Hibi* did not amount to affirmative misconduct; *a fortiori*, the conduct here cannot be so regarded.

> In any case in which it is determined to the satisfaction of the Secretary that an individual failed as of any date to apply for monthly insurance benefits under this Title by reason of misinformation provided to such individual by an officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of—
>
> (A) the date on which such misinformation was provided to such individual, or
>
> (B) the date on which such individual met all requirements for entitlement to such benefits (other than application therefor)
>
> [ ]Effective date.—The amendment made by paragraph (1) shall apply with respect to misinformation furnished after December 1982 and to benefits for months after December 1982.

Thus, under the statute as amended, a claimant who satisfies the substantive requirements for eligibility for benefits but who failed to make written application due to reliance on misinformation furnished by an officer or employee of the SSA may receive benefits notwithstanding that failure. Moreover, because this provision affects applicants who became eligible for benefits but relied on misinformation furnished on or after January 1, 1983, it provides retroactive relief for a substantive period of time. Congress thus has specifically addressed the question of recovery of benefits where there has been reliance upon misinformation furnished by agency employees.[6]

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[6] It is unclear whether petitioners claim they relied on misinformation furnished during the time period affected by Sec-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tion 10302(a) of OBRA of 1989. See Pet. App. 68a. However, if petitioners can demonstrate that they failed to file an application for benefits based upon misinformation that Mrs. Duthu received and relied upon after December 31, 1982, they will on proper application, and if otherwise eligible under the statute, be eligible to receive benefits from 1983 to May 1985.

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